88-687

Supreme Court, U.S.
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

JOHN REES,
SHEILA LOUISE REES,
and THE INFORMATION DIGEST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

If a United States Magistrate who has reviewed the entire case and before whom all of the crucial depositions were taken concludes, that the plaintiff has presented clear and convincing evidence establishing actual malice by the defendants, may the District Court properly determine upon reviewing the same evidence that no reasonable juror could reach the same conclusion?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a not-for-profit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation and Cordite Fidelity, Inc., a Delaware corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LIBERTY LOBBY, INC.

Petitioner,

v.

JOHN REES, SHEILA LOUISE REES
and THE INFORMATION DIGEST

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Petitioner Liberty Lobby, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 29, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals was decided on July 29, 1988, No. 86-7091. The opinion of the district court is reported at 667 F.Supp. 1 (D.D.C. 1986).

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1988. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1) (1987).

STATUTORY PROVISION

Fed. R. Civ. P. Rule 56(c):

Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is no genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On March 30, 1984 *The Information Digest*, published by John Rees and Sheila Louise Rees, published an article entitled "The LaRouche Apparatus [sic] in the U.S." The article asserted that Lyndon LaRouche espoused Marxist, communist, extremist, paranoid, anti-Semitic, revolutionary views and favored violence, torture and the overthrow of the present constitutional government of the United States. The article also asserted that the plaintiff, Liberty Lobby, Inc., hereinafter Liberty Lobby, was closely linked with

LaRouche, his organizations and that some of the most unsavory alleged activities engaged in by the LaRouche group were initiated as a result of an arrangement with Liberty Lobby. In addition, the article asserted that the LaRouche organization was given the run of the offices maintained by *The Spotlight*, a weekly newspaper published by Liberty Lobby. The article contained numerous specific allegations as to fact about the relationship between Liberty Lobby and the LaRouche organizations. All of the allegations as to fact and the conclusion that there was a close working relationship between Liberty Lobby and the LaRouche organizations and that the worst excesses engaged in by the LaRouche organizations were the result of efforts initiated by Liberty Lobby were false, defamatory and without any foundation in fact.

The Information Digest held itself out to be a publication which conducted in depth investigations, maintained close and valuable contacts with the intelligence agencies of the United States, and published verifiable and factual allegations.

On November 14, 1984, Liberty Lobby filed a complaint for libel against John Rees and *The Information Digest*.

On April 19, 1985 John Rees and David J. Branson, Esquire, counsel for Rees and *The Information Digest*, submitted Answers to Plaintiff's Interrogatories. Interrogatory No. 3 Asked "How are editorial decisions made at *The Information Digest*? Who participates in discussions; who has ultimate editorial responsibility?" The response signed by Rees and Branson was as follows: "*Answer*: Editorial decisions are made by John Rees."

However, on August 30, 1985 Rees, represented by Branson, was asked "Does Mrs. Rees on occasion make editorial decisions?" Rees replied "Yes, she does." (Appendix D, A-33, John Rees Depo., August 30, 1985) During that deposition Rees also asserted that his wife, Sheila Louise Rees, was a signatory to the bank account utilized by *The Information Digest*. (Appendix D, A -30, *Id.*)

On November 18, 1985 plaintiff moved to amend the complaint to add Sheila Louise Rees as a defendant. On March 8, 1985, after the complaint for libel had been filed, *The Information Digest* published a series of allegations regarding Liberty Lobby and its treasurer, Willis A. Carto. The article restated, in essence, the original false assertions made about Liberty Lobby in the previous article and asserted that a long-term relationship between Liberty Lobby and the LaRouche organizations existed and continues.

On January 13, 1986 the plaintiff moved for leave to amend and supplement the complaint regarding *The Information Digest* issue

of March 8, 1985. On March 25, 1986, the Court granted that motion.

In the course of an oral deposition taken before Honorable Arthur L. Burnett, Sr., United States Magistrate, on May 23, 1986, Rees testified that a defamatory statement regarding the relationship between the plaintiff and the LaRouche organization was in part based on information received from a confidential source. The plaintiff sought disclosure of the source. On June 10, 1986, the United States Magistrate ruled in part that inasmuch as the plaintiff had already established actual malice by the defendants the confidential source would only comprise cumulative evidence. (Appendix C, A-28; Memorandum Opinion, June 10, 1986) In addition, the Magistrate held that should it be determined that actual malice had not been established by the plaintiff, the plaintiff might move for additional discovery to secure the name of the confidential source.

On May 5, 1986 the defendants filed a motion to limit discovery in this case. On May 13, 1986 the Court granted that motion prohibiting the plaintiff from deposing Martha Powers, who had worked at the offices of *The Information Digest* and denying the plaintiff an opportunity to depose the recipients of *The Information Digest*, including those in the intelligence organizations with whom the defendants asserted they maintained close relationships. On June 17, 1986 the defendants moved for summary judgment asserting that actual malice had not been established and that the articles were substantially true.

On July 10, 1986 the plaintiff submitted its opposition to the motion for summary judgment. On July 10, 1986 plaintiff submitted an application pursuant to Rule 56(f) of the Federal Rules of Civil Procedure asserting that it had been denied an adequate opportunity to conduct discovery and seeking permission to have access to the confidential informant relied upon by Rees in writing the March 30, 1984 article, which access had previously been denied due, in part, to the ruling by the Magistrate that such evidence would be cumulative inasmuch as the plaintiff had already established actual malice on the part of the defendants. The Rule 56(f) application also sought permission to depose Martha Powers and others.

On October 3, 1986 the District Court granted the defendants' motion for summary judgment after having marshalled the evidence showing complete reliance upon the assertions made by the defendants and by drawing all inferences favorable to the defendants.

On November 25, 1986 the plaintiff filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia. On January 9, 1987 the appellees moved for summary affirmance. On January 27, 1987 the appellant submitted its opposition to the motion for summary affirmance asserting that the motion was frivolous. On November 9, 1987 the Court of Appeals denied Appellees' Motion for Summary Affirmance stating "[t]his case is not of the character that would be appropriate for summary disposition."

On November 23, 1987 the appellant moved for sanctions, costs and attorney's fees against the appellees and counsel for having submitted a motion for summary affirmance which was frivolous and without merit and interposed to cause unnecessary delay in the prosecution of this appeal.

On December 3, 1987 appellees filed an opposition to the motion for sanctions and on December 10, 1987 the appellant submitted its reply.

On July 29, 1988 the Court of Appeals affirmed the District Court's entry of summary judgment holding that the plaintiff did not demonstrate sufficient evidence of actual malice to permit a reasonable juror to reach that conclusion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has in this case rendered a decision which conflicts with the applicable decisions of the United States Supreme Court. In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), this Court enunciated the standard for consideration by the District Court of a motion for summary judgment. In *Anderson* this Court held:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.Ct. at 1608-1609. Neither do we suggest that the trial

> courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2513-14

The District Court and the Court of Appeals have ruled in a manner which stands in direct conflict with the teaching of this Court in *Anderson*. In essence, the District Court and the Court of Appeals have held that the standard enunciated by this Court, that all that is required to survive a motion for summary judgment is the presentation of evidence that the plaintiff established the presence of actual malice with convincing clarity is no longer applicable. It may not be said that a United States Magistrate is more partial and less informed as to the facts and the law than an apocryphal potential juror would be. The United States Magistrate had reviewed the entire relevant record and was more knowledgeable regarding the demeanor of the defendants than was the District Court since the Magistrate had presided over all of the relevant depositions including the depositions of the defendants. Based upon his access and analysis of the entire record the United States Magistrate found that the plaintiff had clearly established actual malice in his judgment. The ruling by the District Court and the Court of Appeals in this case, in essence holds that either the United States Magistrate, in this instance a respected legal scholar who has since been appointed to the Superior Court of the District of Columbia, possessed less ability to analyze the evidence than expected of a potential juror, a concept which is unthinkable, or that the standards enunciated by this Court are to be rejected. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 17, United States Supreme Court Rules.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT NO REASONABLE JUROR COULD CONCLUDE THAT THE PLAINTIFF HAD PRESENTED CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE IN VIEW OF THE PRIOR DETERMINATION OF THE MAGISTRATE THAT PLAINTIFF HAD PRODUCED SUFFICIENT AND SUBSTANTIAL EVIDENCE TO ESTABLISH ACTUAL MALICE

The District Court erred in concluding that no reasonable juror could conclude that the plaintiff had presented clear and convincing evidence establishing the actual malice of the defendants. The burden imposed upon the District court in ruling upon a motion for summary judgment was set forth in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986) which constrained the Court to determine whether a reasonable juror could conclude that actual malice had been established by the plaintiff in a clear and convincing fashion. In this instance the gift of prophecy was not required; a United States Magistrate, assigned to the case by the District Court, became familiar with all of the evidence presented by the defendants through presiding over the depositions of defendants John and Sheila Louise Rees, and in considering and ruling upon various motions. In ruling upon a motion related to discovery the Magistrate denied access to confidential sources to Liberty Lobby, in part because he concluded that Liberty Lobby had already established the existence of actual malice by the defendants to his satisfaction and that, therefore, the evidence sought would have been merely cumulative.

The District Court erred in concluding that no reasonable juror could have concluded that actual malice was present when, in fact, a United States Magistrate in command of all of the relevant evidence, including all of the facts relied upon by the defendants, had previously concluded that actual malice had been established.

Liberty Lobby adduced evidence which demonstrated that the defendants made numerous false and injurious statements about Liberty Lobby and its treasurer, that these statements were vituperative, made with malice and were unfounded. Evidence of the attitude of the defendants toward Liberty Lobby and its treasurer came from the testimony of the defendants and from persons offered by the defendants as their witnesses. The defendants said they relied upon a defamatory statement previously published

which statement had been retracted in full by the original publisher prior the time that the defendants relied upon it. The defendants retreated from their published statements during their testimony and were unable or unwilling to provide any basis for the false and defamatory statements they published about Liberty Lobby, an organization they said they despised and which they sought to destroy. The defendants, in effect, admitted that their published statements were false, were unable to offer any foundation for them, admitted that they had relied upon a withdrawn defamatory statement, admitted that they despised Liberty Lobby and its treasurer but claimed that the false statements which they published were not published with actual malice. Liberty Lobby produced clear and convincing evidence establishing that the statements published by the defendants were false and were made with actual malice.

The District Court, before whom none of the depositions were taken, weighed the evidence, evaluated the credibility of the witnesses, accepted all inferences in favor of the defendants and then resolved the issues, concluding that actual malice had not been established. In doing so the Court was selective, relying upon those portions of the evidence offered by the defendants which supported the case of the defendants and rejecting that evidence offered by the plaintiff and the defendants which supported the plaintiff's case. The conduct of the Court contravened the well-settled law which requires that the Court neither weigh the evidence nor pass on questions of credibility, at this stage of the proceedings, and requires as well that the evidence offered by the non-moving party be credited and reasonable inferences which may be drawn from the evidence in favor of the plaintiff be accepted as true. The District Court also denied to Liberty Lobby a reasonable opportunity to discover evidence which would have further impacted directly upon the actual malice of the defendants in publishing their articles. During the very end of discovery, John Rees contradicted himself and offered a new source for his challenged articles. Liberty Lobby was denied an opportunity to depose the newly named source. During discovery it was learned that a woman apparently worked with the defendants in the promulgation of material. Liberty Lobby was denied an opportunity to depose that witness. In his memorandum opinion, the United States Magistrate denied to Liberty Lobby an opportunity to secure additional evidence based in part upon the holding by the Magistrate that such evidence was cumulative, in that Liberty Lobby had already proven the presence of actual malice. The

Court both found the absence of malice and that Liberty Lobby was to be prohibited from seeking the evidence, denied in part since it was redundant.

In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), the Supreme Court enunciated the standard for consideration by the District Court of a motion for summary judgment:

> The Court has said that summary judgment should be granted where the evidence is such that it "would required a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed. 2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.
>
> *Anderson v. Liberty Lobby*
> 106 S.Ct. at 2512

In determining whether or not the evidence should be submitted to a jury this Court asserted yet again that the evidence offered by the nonmoving must be believed, that all justifiable inferences are to be drawn in favor of the non-moving party and that determinations as to credibility and the weighing of the evidence are jury functions not those of a judge when he is ruling on a motion for summary judgment. In *Anderson* the Court held:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-

> movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.C.t. at 1608-1609. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2513-14

The law requires the District Court to determine what a reasonable juror might do with the evidence presented to it. Could a reasonable juror, accepting the evidence of the plaintiff as true, and drawing all justifiable inferences from that evidence in favor of the plaintiff, reach the conclusion that the plaintiff had established the presence of actual malice with convincing clarity? In *Anderson*, Justice Brennan in dissent commented upon the unfair burden placed upon the District Court and Courts of Appeal:

> What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and the courts of appeal that must struggle to clean up after us.
>
> *Anderson v. Liberty Lobby, Inc.*
> 106 S.Ct. at 2520
> Justice Brennan Dissenting

In the instant matter, however, no gift of prophecy is required to know what a reasonable mind might conclude when exposed to the evidence in this case. Honorable Arthur L. Burnett, Sr., United States Magistrate, was assigned by the District Court to preside over the depositions of the defendants and to rule upon various pretrial matters. During his deposition on May 23, 1986, John Rees testified before the Magistrate that a defamatory statement published by *The Information Digest* on March 30, 1984 was based in part upon information received from a confidential source. The statement centered upon the allegation that was relevant to the alleged collaboration between Liberty Lobby and the LaRouche organization, an allegation denied by Liberty Lobby. Liberty Lobby asserted that Rees knew that the statements which

he published were false or that he made them with reckless disregard for the truth. When counsel for the plaintiff moved at the deposition session to compel disclosure of the identity of the confidential source, the Magistrate deferred ruling and requested that counsel file legal memoranda on the issue. The Magistrate denied subsequently Liberty Lobby's motion to compel disclosure of the source stating in part that "the Magistrate is of the view that the disclosure of the confidential source is not essential to the plaintiff's case-in-chief." (Appendix C, A-26, Memorandum Opinion, June 10, 1986) In his Memorandum Opinion the Magistrate explained the basis of that ruling:

> The Magistrate is of the view that the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e. knowing falsity or reckless disregard of the truth. Counsel for the plaintiff has astutely, during the depositions of the defendants, probed their editorial processes and their state of mind with reference to research, writing and publishing of the two articles at issue in this case, as he was entitled to do under *Herbert v. Lando*, 441 U.S. 153 (1979).
>
> (Appendix C, A-26, Memorandum Opinion, June 10, 1986)

On December 26, 1984 the defendants John Rees and *The Information Digest* moved to dismiss the case and for a more definite statement. Submitted with that motion was a twenty-nine page affidavit signed by John Rees and various other exhibits. The Rees Affidavit was in essence, resubmitted to the District Court by counsel for Rees on June 17, 1986 as the Defendants Statement of Material Facts. Although both Mr. and Mrs. Rees repudiated substantial portions of the Rees Affidavit in their testimony before the Magistrate the affidavit was offered by counsel for the defendants in conjunction with their motion for summary judgment. The Rees Affidavit comprised the entire factual basis for the defense against the evidence that the defendants had published with actual malice. The Rees Affidavit was offered in evidence during the deposition of John Rees and line-by-line, paragraph-by-paragraph, formed the basis for questions put to the defendants during the deposition

presided over by the Magistrate. Thus, the Magistrate became familiar with the entire defense case. It is true that additional evidence was offered to the District Court after the conclusion of the depositions before the Magistrate bearing on the question of actual malice. However, that evidence was offered by the *plaintiff* and further demonstrated the presence of actual malice. After the Magistrate had examined all of the relevant evidence in the case and had presided over all of the depositions of substance, in his Memorandum Opinion he concluded:

> Based on the Magistrate's exposure to this case and hearing the depositions of both John Rees and Sheila Louise Rees, the two principals involved in the publication of the *Information Digest* and the two (2) articles involved in the case, one of March 30, 1984 and the other of March 8, 1985, it appears that the plaintiff already has substantial evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead at this point in time only to cumulative evidence. Of course, the Magistrate does not intend to prejudge the merits of this case, but at argument on June 4, 1986 counsel for the plaintiff did acknowledge that he felt he had a *prima facie* case against the defendants. If the Magistrate is wrong in this assessment of the case, counsel can ask for a brief extension of the discovery completion date of June 6, 1986 by filing a motion to be acted upon by the Court (Revercomb, J) setting forth good cause for a brief extension of discovery and the names of those alternative source individuals they now wish to depose and a statement of the importance of their depositions at this stage of the case.
>
> (Appendix C, A-28, Memorandum Opinion, June 10, 1986)

Liberty Lobby does not contend, as incorrectly implied by counsel for the appellees in his motion for summary affirmance (Motion for Summary Affirmance, pp. 8-9) and repeated by the Court of Appeals, that the Magistrate had been designated to hear and determine a motion for summary judgment. Reason compels the conclusion that if a United States Magistrate, fully familiar with the issues in the case and with the applicable law, who has presided over all of the depositions of substance in the case, and who has reviewed all of the relevant arguments and documents in the case over a period of more than half a year, has concluded that actual malice has been established by the plaintiff to his satisfac-

tion, it is not possible to assert that a reasonable mind could not reach the same conclusion. In this unusual circumstance, unlike other instances where the District Court is constrained to rule on a motion for summary judgment, it is not necessary for the Court to predict what a reasonable juror might possibly make of the evidence. In this case, an impartial jurist in possession of all of the relevant facts, law and arguments who also, unlike the District Court had the opportunity to witness the repeated perjury of the defendants as well as statements offered by them which demonstrated their feelings of contempt, vituperation and malice toward the plaintiff, concluded that actual malice had been demonstrated, and published that finding on two separate occasions in a memorandum opinion.

CONCLUSION

For the foregoing reasons, this petition for writ of *certiorari* should be granted.

October 27, 1988

Respectfully submitted,

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